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NO. 85-100 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

CLARENCE CARL BLACKBURN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE MICHIGAN COURT OF APPEALS INCORRECTLY INTERPRETED RELEVANT FEDERAL LAW WHEN HOLDING THAT STATEMENTS MADE BY RESPONDENT IN RESPONSE TO POLICE QUESTIONING HAD TO BE SUPPRESSED BECAUSE THE DETENTION AND QUESTIONING OF RESPONDENT VIOLATED THE RULES ENUNCIATED IN MIRANDA V ARIZONA, 384 US 436 (1964)?

II. DOES THIS COURT HAVE THE POWER, UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION, TO HOLD THAT A STATEMENT OBTAINED IN VIOLATION OF THE RULES ENUNCIATED IN MIRANDA V ARIZONA, 384 US 726 (1966) IS NOT ADMISSIBLE AT A TRIAL IN STATE COURT?

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COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the folowing additions and/or corrections.

Police went to the trailer owned by Respondent's brother in regard to a possible shooting. They observed a man bleeding from an apparent gunshot wound. Officer Hunt told Respondent and the other three people in the trailer that they were "all going to be detained there to make statements." According to Officer Hunt, there were between five and seven police officers in the trailer. After Respondent stated that he shot Gentry, he formally placed Respondent under arrest.

Officer Lopez escorted Respondent to a patrol car. On the way to the car Respondent again stated he had shot Gentry.

Officer Watters drove Respondent to the police station. Lopez followed in another car.

At the station, Lopez read Respondent his Miranda rights - for the first time.

The three other people in the trailer were all taken to the police station "for statements".

The Michigan Court of Appeals specifically found that Respondent's initial statement was the product of the coercion of detention because there had been no response to police inquiries until after the police had stated that the individuals in the trailer would be held at the scene until their statements were taken.

1. **THE MICHIGAN COURT OF APPEALS CORRECTLY INTERPRETED RELEVANT FEDERAL LAW WHEN HOLDING THAT STATEMENTS MADE BY RESPONDENT IN RESPONSE TO POLICE QUESTIONING HAD TO BE SUPPRESSED BECAUSE THE DETENTION AND QUESTIONING OF RESPONDENT VIOLATED THE RULES ENUNCIATED IN MIRANDA V ARIZONA, 384 US 436 (1964).**

Respondent was charged with first-degree murder in connection with the shooting death of S. R. Gentry. Respondent testified at trial and admitted shooting Gentry, but asserted that he acted in self-defense. The jury ultimately found Respondent guilty of second-degree murder.[1/] Subsequently, the Michigan Court of Appeals reversed Respondent's conviction on state grounds regarding the improper admission of evidence. The Michigan Court of Appeals also suppressed several statements made by Respondent which the prosecution had used as part of its case-in-chief, but held that one statement was still admissible.[2/]

Because Respondent's conviction was reversed on unrelated state grounds, Petitioner concedes that Respondent will have to be retried regardless of how this Court ultimately resolves the claims raised in its Petition. Petitioner seeks review by this Court solely to enable it to use the statements suppressed by the Michigan Court of Appeals at the retrial.

Petitioner has failed to establish that the statements suppressed by the Michigan Court of Appeals are essential to its

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1/ Respondent was also charged with, and convicted of felony firearm.

2/ The following statements were suppressed:

> "I'll save everybody a lot of trouble. I'm the one that did it.
>
> * * *
>
> I'm the one who did it. I'm the one who shot him.
>
> * * *
>
> [I] shot the guy because he was fucking with [me]."

The following statement was not suppressed:

> "I hope the mother... F dies."

ability to prosecute Respondent or that they would substantially strengthen its case. The Michigan Court of Appeals did not suppress all of the statements made by Respondent. One statement is still available for use at Respondent's retrial. Additionally, Petitioner admits that Respondent testified at trial and raised a defense of self-defense. Petitioner has made no showing that the testimony Respondent gave at trial could not be used against him at the retrial.

Petitioner's claim that the decision of the Michigan Court of Appeals is in conflict with decision of other state courts and the Eighth Circuit Court of Appeals is without merit. In State v Longley, 483 A2d 725 (Me, 1984) the Maine Supreme Judicial Court applied the same test for determining custodial interrogation that the Michigan Court of Appeals applied in the instant case.[3/] Applying this test the Court found that because the defendant had approached the police officer at a softball game and initiated the discussion in question, he had not been subjected to custodial interrogation. State v Carlise, 458 So 2d 1347 (La App, 1984) and United States v Rorex, 737 F2d 753 (CA 8, 1984) are factually distinguishable from the instant case. In both Carlise and Rorex the defendant was not informed that he was not free to leave and, at the conclusion of the interview, was not placed under arrest but was allowed to proceed on his way.[4/] Here, Respondent was expressly told that he was not free to leave and was immediately placed under formal arrest after stating he shot the victim.

Petitioner's assertion that the Michigan Court of Appeals has misconstrued applicable Federal law is also without merit. In Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd 2d 694

3/ "A person is in custody for the purposes of Miranda only when he is deprived of his freedom in some significant way, or would be led, as a reasonable person, to believe he was not free to leave the presence of the police." 483 A2 at 730.

4/ See Oregon v Mathiason, 429 US 492; 97 S Ct 711; 50 LEd 2d 714 (1977).

(1964) this Court expressly held that a person was in custody when he is deprived of his freedom in any significant way. Custody for purposes of Miranda has also been defined as when a reasonable person would believe that he was not free to leave United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 LEd 2d 497 (1979); Florida v Royer, 460 US 491; 103 S Ct 1319; 75 LEd 2d 229 (1983). This Court has also expressly recognized that it is not controlling whether the suspect has been formally placed under arrest. Dunaway v New York, 442 US 200; 99 S Ct 2248; 60 LEd 2d 824 (1979).

Petitioner contends that the giving of Miranda warnings was not required in the instant case because Respondent was not "in custody" when the subject of police interrogation. Petitioner does not contend that Respondent's liberty was not restrained or that Respondent was either free to leave or did not reasonably believe that he was not free to leave when subjected to police interrogation. Instead Petitioner argues, relying on the decisions of this Court in Terry v Ohio, 393 US 1; 88 S Ct 1868; 20 LEd 2d 889 (1968) and Berkemer v McCarty, 468 US ___; 104 S Ct ___; 82 LEd 2d 317 (1984), that Respondent was not "in custody" for purposes of Miranda.

Petitioner's reliance on Terry and Berkemer is misplaced. Terry dealt with the application of Fourth Amendment protections against unreasonable searches and seizures to situations where a police officer, with articulable suspicions of criminal activity, briefly detains an individual and conducts a protective pat-down for weapons. Terry did not directly address the issue of whether it was permissible to question the detainee without the giving of Miranda warnings. In Berkemer this Court held that persons temporarily detained pursuant to ordinary traffic stops were not "in custody" for purposes of Miranda. The bases for this holding were the temporary nature of the detention (and the expectation of the detainee that he would be allowed to continue on his way after a brief delay), and the non-threatening and public nature

of the detention. Drawing an analogy to a "Terry stop", the Court held that during the course of a brief detention the investigating officer could ask a moderate number of questions but simultaneously stressed that the detainee was not required to answer.

Factually, the case at bar presents a situation vastly different from that in Berkemer. The police here were not concerned with a minor traffic offense. Instead, they were investigating what appeared to be either a homicide or a serious assault with a deadly weapon.[5/] The detention was not in a public place. The dead or seriously injured victim had just been removed from the trailer by the emergency medical team. The police had focused their suspicion on Respondent and the other three persons they found in the trailer.[6/] See Escobedo v Illinois, 378 US 478; 84 S Ct 1758; 12 LEd 2d 977 (1964). The police had conducted a search for weapons. There were between five and seven police officers in the trailer. Most importantly, when the police initially asked the people in the trailer what had happened they did not get a response. The police advised Respondent and the other suspects that they would not be allowed to leave until their statements had been obtained. Only then did Respondent make a statement. Even after Respondent admitted shooting Gentry, the other suspects were not released. Instead, they were kept in police custody and taken to the police station so that the police could take statements from them.[7/] These

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5/ In Michigan assault with intent to murder MCLA 750.83; MSA 28.278 has a maximum penalty of life.

6/ Absent reasonable and articulable suspicion, the police had no legal basis for detaining Respondent and the other three individuals in the trailer, Terry v Ohio, supra. Had the police found only one person in the trailer, there is no question that that person would have been the focus of the investigation and any custodial questioning of that individual would have to be preceded by the giving of Miranda warnings. The fact that the police found four people in the trailer instead of one simply made the four of them the focus of the investigation. It did not eliminate the need to proceed any custodial questoning with the giving of Miranda warnings.

7/ When the police entered the trailer and found four people inside, they were faced with several possibilities: none of

(Footnote Continued on Next Page)

facts substantially distinguish the instant case from Berkemer and Terry, where the right not to have to answer the investigating officer's questions and the temporary nature of the stop were expressly recognized. The Michigan Court of Appeals specifically found that Respondent's statement was the product of the coercion of detention because there had been no response to police inquiries prior to Officer Hunt's statement that Respondent and the other people in the trailer would have to remain until the police had obtained statements from them. The holding of the Michigan Court of Appeals is entirely consistent with the standards enunciated by this Court in Miranda and other cases, and correctly applied the essence of the Miranda decision to the facts of this case.

(Footnote Continued From Previous Page)

the four were involved in the shooting, one of the four acted alone, two or more of the four acted in concert.

II. THIS COURT HAS THE POWER, UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION, TO HOLD THAT A STATEMENT OBTAINED IN VIOLATION OF THE RULES ENUNCIATED IN MIRANDA V ARIZONA, 384 US 726 (1966) IS NOT ADMISSIBLE AT A TRIAL IN STATE COURT.

Petitioner's claim that the rules promulgated in Miranda v Arizona exceeded this Court's Article III powers was neither briefed nor argued in the Michigan Court system. In the Michigan Court of Appeals, Petitioner took the position that "[Respondent's] statement's were obtained in compliance with the rules set forth in Miranda v Arizona, 384 US 426 (1966)." 8/ Subsequently, in a Motion for Rehearing, Petitioner asserted that the Michigan Court of Appeals "miscontrued the holding of the United States Supreme Court in Miranda v Arizona, 384 US 426 (1966)." 9/ Petitioner made this same assertion in its Application for Leave to Appeal in the Michigan Supreme Court.10/

In its Petition for a Writ of Certiorari, Petitioner for the first time argues that this Court lacked the authority to impose the prophylactic rules enunciated in Miranda on the states. Petitioner admits that this position was not presented for resolution in the state courts, but asserts that the right to raise this issue was preserved by the statement in its Brief in Support of Application for Leave to Appeal that it "reserves the right to raise...the propriety of federal court imposing prophylactic rules upon state courts" (PET 26-27). No authority was presented to support the novel claim that the right to raise issues not then litigated can be reserved. In Steagold v United States, 451 US 204; 101 S Ct 1642; 68 LEd 2d 38 (1981), this Court held that a party waives the right to present claims which were not raised in a timely fashion during the litigation. Steagold bars Petitioner's untimely assertion of the claim that

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8/ Plaintiff's Brief page 10.

9/ Plaintiff's Motion for Rehearing page 3.

10/ Plaintiff's Application for Leave to Appeal page 4.

this Court lacked the authority to impose the prophylactic rules enunciated in Miranda on the states.

Substantively, the claim advanced by Petitioner is not new. A similar claim was made and rejected over 40 years ago. In his dissenting opinion in Ashcraft v Tennessee, 322 US 143; 88 LEd 1192; 64 S Ct 921 (1944) Justice Jackson argued that the Supreme Court did not have the power to impose on the states a conclusive presumption that a statement obtained after 36 hours of interrogation was not voluntary. This contention was rejected by the six member majority. Justice Jackson's dissent was joined by only two other justices.

Three dissenting opinions were written in Miranda. Not one of the dissenting opinions was based on the grounds previously advanced by Justice Jackson in Ashcraft. While the dissenters contested the wisdom of the rules promulgated by the majority, none contested the power of the Court to impose such rules on the states. Shortly after Miranda was decided Justice White said, in an address to the Nineteenth Annual Meeting of the Conference of Chief Justices, that in terms of the function the Court was performing, Miranda was consistent with prior decisions of the Court:

> "Is the arrested suspect, alone with the police in the station house, being 'compelled' to incriminate himself when he is interrogated without proper warnings? Reasonable men may differ about the answer to that question, but the question itself is a perfectly straightforward one under the Fifth Amendment and little different in kind from many others which arise under the Constitution and which must be decided by the courts. No ready answer to Miranda can be found by reference to the test of the Constitution alone. The answer lies in the purpose and history of the self-incrimination clause in our accumulated experience.
>
> This kind of judicial decision making is inherent in our present governmental structure.
>
> * * *
>
> Of course, to say that the courts must decide a case like Miranda, is one thing. The question of whether it is correctly or wisely decided is quite another. As a matter of constitutional interpretation, I disagreed

> with the result reached in that case and the reasons given for it and repeated my disagreement last term. But is now the law and whatever its merits, it is plainly a derivative of Malloy v Hogan, applying the Fifth Amendment to the States, and Gideon v Wainwright, which required counsel in most kinds of criminal cases. In terms of the function which the Court was performing, I see little difference between Miranda and the several other decisions, some old, some new, which have construed the Fifth Amendment in a manner in which it has never been construed before, or as in the case of Miranda, contrary to previous decision of the Court and of other courts as well."
>
> Recent Developments in Criminal Law, Address given by Justice Byron R. White, United States Supreme Court, to the Counsel of State Governments Nineteenth Annual Meeting of the Conference of Chief Justices (1967).

Petitioner places great reliance on an as yet unpublished law review article written by Professor Joseph Grano. [11/] This article has not been subjected to scholarly review and criticsm. The validity of the position advocated by Professor Grano cannot be fairly evaluated until it has been subjected to the rigors of scholarly analysis and criticism. It would be more appropriate to defer consideration of Professor Grano's theories until such time as other legal scholars have had the opportunity to evaluate and comment on them.

This Court has the inherent power to adopt appropriate remedies to insure that rights guaranteed by the Constitution are not abridged. The adoption of a "bright line" rule, rather than hindering effective law enforcement, promotes it by clearly delineating, in the majority of situations, what conduct is proper and what is not. The Miranda decision is consistent with the approach taken in numerous other cases decided by this Court. Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 LEd 2d 378 (1981); United States v Wade, 388 US 218; 87 S Ct 1926; 18 LEd 2d 1149 (1967); Ashcraft v Tennessee, supra; North Carolina v Pierce, 395 US 711; 89 SCt 2072; 23 LEd 2d 656 (1969); Gideon v

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11/ Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy; ___ North Western Law Rev ___ (1985).

Wainwright, 372 US 335; 83 SCt 792; 9 LEd 2d 799 (1963); Boykin v Alabama, 395 US 238; 89 S Ct 1709; 23 LEd 2d 274 (1969); Massiah v United States, 377 US 201; 84 S Ct 1199; 12 LEd 2d 246 (1964); Argersinger v Hamlin, 407 US 25; 92 S Ct 2006; 32 LEd 2d 530 (1972); Ballew v Georgia, 435 US 2231; 98 S Ct 1029; 55 LEd 2d 234 (1978); United States v Robinson, 414 US 218; 94 S Ct 467; 38 LEd 2d 427 (1973); New York v Belton, 453 US 454; 101 S Ct 2860; 69 LEd 2d 768 (1981); South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 LEd 2d 1000 (1976).

In the twenty years since Miranda was decided, the power of this Court to impose such prophylactic rules has not been questioned in any of this Court's decisions. Even in those cases where the extent of the protection afforded by Miranda has been limited, see Harris v New York, 401 US 222; 91 S Ct 643; 28 LEd 2d 1 (1971) and New York v Quarrels, ___ US ___; 104 S Ct ___; 81 LEd 2d 550 (1984), this Court has expressly reaffirmed its continuing adherence to the fundamental concepts of Miranda. See also Oregon v Elstad, 470 US ___; 106 S Ct ___; 84 LEd 2d 222 (1985); Berkemer v McCarty, supra; Edwards v Arizona, supra; Rhode Island v Innis, 446 US 291; 100 S Ct 1682; 64 LEd 2d 297 (1980); and Brewer v Williams, 430 US 87; 97 S Ct 1232; 51 LEd 2d 424 (1977), all of which reaffirm the continuing validity of Miranda.

As long as the right to be free from compulsory self-incrimination remains an integral part of our Constitution, the admissibility of incriminating statements will inevitably be a continuing source of litigation. No rule will provide a complete test for determining admissibility.

The mere fact that Miranda has not ended litigation regarding the admissibility of incriminating statements does not provide a valid reason for the abandonment of its approach. The Miranda approach has not only withstood the test of time and contributed to the professionalization of law enforcement in this country, but it has provided police with clear rules to follow

when conducting custodial interrogations. Abandoning Miranda would have two serious adverse consequences. First, it would have a disproportionate effect on the poor and uneducated, who are both less familiar with their rights and more easily intimidated by those in positions of authority. Second, it would result in the replacement of a standard based primarily on objective criteria with a wholely subjective standard of the type advocated by Petitioner. As standards become more subjective, consistency of application becomes more difficult. As things now stand, police officers who comply with Miranda can be virtually assured that any statements they obtain will ultimately be held to be admissible.

The Constitutional prohibition against compulsory self-incrimination embodies a recognition, based on painful experience, that the power of the state should not be used to extract confessions from those suspected of criminal activity. The rules promulgated in Miranda have served to ameliorate the coercive effect of custodial interrogation without preventing the police from obtaining statements which are truly voluntary. Miranda is directly based on the constitutional prohibition against compulsory self-incrimination, and the approach taken in Miranda is not only consistent with other decisions of this Court but represents a proper application of this Court's power to enforce constitutional protections against state action and give meaningful guidance to those charged with enforcing our laws both on the streets and in the Courts.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 13, 1985

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APPENDIX

As footnote 3 to the opinion of the Michigan Court of Appeals appears in Petitioner's Appendix, the word "detention" is erroneously transformed into "detection" (18a). Footnote 3 should read as follows:

> "FN3. It should also be noted that, until Officer Hunt said that everybody would have to remain on the scene until he could get statements, he got no response to any of his inquiries. The compulsion of detention, then, was actually necessary to get defendant to talk."